BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR APPROVAL OR REJECTION OF AN ENERGY SALES AGREEMENT WITH COLEMAN HYDROELECTRIC, LLC FOR THE SALE AND PURCHASE OF ELECTRIC ENERGY FROM THE COLEMAN HYDRO PROJECT	)	**CASE NO. IPC-E-20-27** **ORDER NO. 34991**

The Commission has before it Coleman Hydroelectric, LLC's ("Seller") Petition for Reconsideration of Commission Order No. 34780 ("Petition"), in which the Commission conditionally approved Seller's Energy Sales Agreement ("ESA") with Idaho Power Company ("Company"). Having reviewed the record, the Commission denies Seller's Petition.

THE AGREEMENT

On June 25, 2020, the Company applied for approval or rejection of a proposed ESA with the Seller for energy generated by the Coleman Hydro Project (the "Facility"). *Application* at 1. The Facility, near Leadore, Idaho, is a qualifying facility ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and has an 800-kW nameplate capacity. *Id.* In its opening paragraph, the ESA states the Seller and Company "entered into [the ESA] on this 19th day of June 2020. . . ." ESA at 1. Thus, the ESA's "Effective Date" was June 19, 2020. *See* ESA at p. 3, § 1.11 (the ESA's "Effective Date" is "[t]he date stated in the opening paragraph of this [ESA] representing the date upon which this [ESA] was fully executed by both Parties."); *see also* ESA at p. 13, § 5.1 ("[s]ubject to the provisions of paragraph 5.2 below, this Agreement shall become effective on the Effective Date").

The ESA is a new QF contract providing the Seller would sell the electric energy generated by the Facility to the Company at the published, non-levelized, seasonal hydroelectric avoided cost rates set by Order No. 34350 (this Order is operative for contracts entered into between June 1, 2019 and May 31, 2020), for a 20-year term. *Id.* at 2 and 4.

The Company represented the ESA complies with past Commission orders. *Id.* at 2. The Company asked the Commission to issue an order approving or rejecting the ESA and, if

approved, declaring all payments for the purchases of energy under the proposed ESA to be allowed as prudently incurred expenses for ratemaking purposes.[1] *Id.* at 5.

FINAL ORDER 34870

On December 17, 2020, the Commission issued Order No. 34870 approving the ESA on condition that the Company and Seller update the ESA's published avoided cost rates to include the new rates from Order No. 34683 that took effect on June 1, 2020 instead of the old rates from Order No. 34350 that expired on May 31, 2020, before the ESA took effect.

Each year the Commission updates the published avoided cost rates available to QFs who wish to enter ESAs with electric utilities. This annual update is effective each year on June 1. On May 29, 2020, the Commission issued Order No. 34683, which updated the published avoided cost rates by setting new rates that took effect on June 1, 2020. In the order that the Seller asks the Commission to reconsider—Order No. 34870—the Commission observed that the parties explicitly agreed to the ESA's "Effective Date" within the terms of their negotiated ESA. Notwithstanding the Seller's arguments to the contrary, the Commission accepted "the parties' representations in their contract – that they intended the 'Effective Date' to be when the ESA was fully executed by both parties on June 19, 2020." *Id*. Consequently, the Commission found it reasonable and just to approve published avoided cost rates that took effect on June 1, 2020.

The Commission also found that a legally enforceable obligation ("LEO") did not occur before the old rates from Order No. 34350 expired on June 1, 2020:

> [T]he parties entered negotiations that, ultimately, resulted in an agreement. Neither party asserts that the other caused undue delay. [The Federal Energy Regulatory Commission ("FERC")] LEO standards, prior to the issuance of Order No. 872 and after it, are intended to prevent intransigence and undue delay by a utility in negotiating with a QF. None of those circumstances apply here.

Id. The Commission noted if the Company and Seller had intended for the ESA to have a different effective date, they should have negotiated one. *Id*. citing *A.W. Brown Co., v. Idaho Public Utilities Commission*, 121 Idaho 812, 816-818, 828 P.2d 841, 845-847 (1992). As a result, and based on the plain language of the contract, the ESA became effective on June 19, 2020 which

[1] By the ESA's terms, it shall not become finally effective until the Commission has approved all the terms and declares that all payments to be made by the Company to Seller will be allowed as prudently incurred expenses for ratemaking purposes. ESA at p. 30, § 21.1.

made the Seller eligible for the published avoided cost rates approved by Order No. 34683 (rates that took effect on June 1, 2020). *Id.*

The Commission also found that the Company's payments for purchases of energy under the ESA would be prudently incurred expenses for ratemaking purposes. *Id*.

PETITION FOR RECONSIDERATION

On January 4, 2021, the Seller petitioned the Commission to reconsider Order No. 34870 and issue a new order approving the ESA with the old rates from Order No. 34350 even though the ESA "was not finally executed before June 1, 2020" when the old rates expired. *See Petition* at 2. On February 2, 2021, the Commission granted the Seller's Petition, finding it appropriate to consider the additional issues raised. Order No. 34909 at 2. The Commission also found that the existing record was sufficient to enable it to consider these issues. *Id*. The Seller's Petition asserted four grounds for reconsideration, which are set forth below.

At its regularly scheduled Decision Meeting on March 9, 2021, the Commission closed the record in this case.

A. Ground I of the Petition. The Commission's Order unlawfully applied federal law under PURPA and 18 C.F.R. § 292.304(d)(2)(ii).

The Seller argued it is entitled to the old rates that expired on June 1, 2020 because it had incurred a LEO by committing to sell electricity to the Company before the old rates expired. *Id*. at 7. The Seller thus asserted Order No. 34870 violates PURPA, 18 C.F.R. § 292.304(d)(2)(ii), and FERC decisions allowing a QF to form a LEO. The LEO entitles the QF to long-term avoided cost rates in effect when the QF commits to selling power to the utility, even if a contract has not yet been executed.[2] *Petition for Reconsideration* at 7-11, citing *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,005 (2011), *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013), *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012) and *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012).

The Seller asserted that the cases cited by the Commission to deny QFs the right to LEOs based on effective dates contained in the written contracts has been rejected by FERC. *Id*. at 8 citing *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013); *Murphy Flat Power, LLC*, 14l FERC ¶ 61,145 (2012); *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012); *Cedar Creek*

[2] The Seller also claimed that in a stipulated dismissal of a dispute in federal court the Commission acknowledged that a LEO may be formed before a contract has been executed. *Petition* at 9-10.

Wind, LLC, 137 FERC ¶ 61,006; *see also* citing *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, Order No. 872*, 172 FERC ¶ 61,041, at P. 685 (July 16, 2020).[3] The Seller further asserted the Commission erred in finding that a LEO may be used only where a QF proves the utility caused a delay in the execution of a written agreement. *Petition* at 9. The Seller argued that FERC rejected this reasoning. *Petition* at 9 citing *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at P. 40 (2013).

B. <u>Ground II of the Petition</u>. The Commission's Order fails to properly apply state law because it ignores past Commission cases.

The Seller argued Order No. 34870 ignores Commission precedent that approved a QF's right to rates in effect before the effective date of the QF's ESA. *Id*. at 14-18. The Seller cited 20 prior orders where the Seller alleges that the Commission approved rates in effect before the effective date of the subsequently executed ESA.

C. <u>Ground III of the Petition</u>. The Commission's Order rests on an erroneous finding of fact and is not supported by sufficient evidence.

The Seller asserted that the Commission had insufficient evidence to find that the Seller and the Company intended their ESA's effective date to override the Order No. 34350 rates specified in the ESA. *Id*. at 19-22.

D. <u>Ground IV of the Petition</u>. The Commission's Order results in an unreasonable and unjust result for the Seller.

Last, the Seller argued Order No. 34870 is unreasonable and unjust because Seller invested substantial sums expecting it would be paid the old rates through the ESA. *Id*. at 23-25. The Seller asserted the equities favor the Commission approving the ESA using the old rates. *Id*. at 23. The Seller asserted it would not have committed to such a large investment in the Facility had it been aware the old rates were unavailable. *Id*. at 23. The Seller also stated it was unrepresented by counsel when it negotiated and executed the ESA and was unaware that the Commission would not approve the ESA with the old rates. *Id*. at 24. The Seller also noted that the ESA was finalized during a global pandemic in the face of various government restrictions on business activities. *Id*.

[3] FERC amended 18 C.F.R. § 292.304 by Order 872-A, 173 FERC ¶ 61,158, 85 Fed. Reg. 86656 (December 30, 2020), which became effective on February 16, 2021.

LEGAL STANDARDS

A. Reconsideration

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may grant reconsideration by reviewing the existing record, by written briefs, or by evidentiary hearing. IDAPA 31.01.01.311.03. Consistent with the purpose of reconsideration, the Commission's Rules of Procedure require that petitions for reconsideration "set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or not in conformity with the law." Rule 331.01, IDAPA 31.01.01.331.01. Rule 331 further requires that the petitioner provide a "statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted." *Id*. A petition must state whether reconsideration should be conducted by "evidentiary hearing, written briefs, comments, or interrogatories." IDAPA 31.01.01.331.03. Grounds for reconsideration or issues on reconsideration that are not supported by specific explanations may be dismissed. IDAPA 31.01.01.332.

B. PURPA

The Commission has been granted authority to implement PURPA and is the appropriate state forum to review contracts between QFs and electric utilities. *Idaho Code* § 61-502, 61-503; *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992); *Empire Lumber Co. v. Washington Water Power Co.*, 114 Idaho 191, 755 P.2d 1229 (1987). Moreover, the Commission has the authority to engage in case-by-case analysis in setting its standards and requirements for implementation of PURPA. *Power Resources Group v. PUC of Texas*, 422 F.3d 231, 237 (5th Cir. 2005) citing *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of [PURPA]*, 23 FERC ¶ 61,304, 1983 WL 39627 (May 31, 1983); *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 917 P.2d 766 (1996). It is up to the States, not FERC, to determine the specific parameters of individual QF power purchase agreements, including the date at which a LEO is incurred under state law. *Idaho Power Company v. Idaho Public Utilities Commission*, 155 Idaho 780, 316 P.3d 1278 quoting *Power Resource Group*, 422 F.3d at 238; *accord Rosebud*, 128 Idaho at 623-24, 917 P.2d at 780-81. "FERC has

given each state the authority to decide when a LEO [legally enforceable obligation] arises in that state." *Power Resource Group*, 422 F.3d at 239. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine. *West Penn Power Co.*, 71 FERC ¶ 61153 at 61495 (1995), Accord: *Jersey Central Power & Light Co.*, 73 FERC ¶ 61092 at 61297-61298 (1995); *Metropolitan Edison Co.*, 72 FERC ¶ 61015 at 61050 (1995). FERC is not a forum for adjudicating the specific provisions of each QF contract. *Id.* The exercise of a state commission's discretion in applying PURPA standards to contracts has long been recognized as outside the scope of FERC's enforcement authority.[4]

COMMISSION FINDINGS AND DECISION ON RECONSIDERATION

Based on a review of the record and applicable authorities, the Commission reaffirms its findings in Order No. 34870 and denies the Seller's Petition as discussed below.

A. Ground I of the Petition. The Commission's Order complies with Idaho case law and PURPA.

The Seller argued it was entitled to the expired, Order No. 34350 rates, because it had formed a LEO with the Company before June 1, 2020. The Seller cites FERC decisions that it claims require this Commission to modify its final order and approve an ESA with expired published avoided cost rates.

To begin, the FERC cases cited by the Seller are declaratory orders and do not bind this Commission. A declaratory order "does no more than announce the [FERC's] interpretation of the PURPA or one of the agency's implementing regulations." *Niagara Mohawk Power Corp., v. FERC*, 117 F.3d 1485, 1488, 326 U.S. App. D.C. 135, 138 (1997). It is "of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA." *Id.*

Furthermore, the Idaho Supreme Court has affirmed Commission orders that addressed similar facts and applied the same legal authorities as in Order No. 34870. *See A.W. Brown Co., v. Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841 (1992); *Rosebud Enterprises, Inc. v. Idaho*

[4] *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304 at 61,645 (1983) (". . . the Commission's role is limited regarding questions of the proper application of these rules on a case-by-case basis"). *See Power Resource Group, Inc. v. Pub. Utils. Comm'n of Texas*, 422 F.3d 231, 238 (5th Cir. 2005); *Mass. Inst. Tech. v. Mass. Dept. of Pub. Utils.* 941 F. Supp. 233, 236-237 (D. Mass. 1996).

Public Utilities Commission, 131 Idaho 1, 951 P.2d 521 (1997); *Idaho Power Company v. Idaho Public Utilities Commission*, 155 Idaho 780, 316 P.3d 1278 (2013).

In *A.W. Brown* the Idaho Supreme Court reviewed whether the Commission could require a QF either to have: (1) a signed contract with a utility; or (2) filed a meritorious complaint alleging that the project was mature, and that the developer had attempted, and failed, to negotiate a contract with the utility before locking in an avoided cost rate. *A.W. Brown Co.*, 121 Idaho at 815, 828 P.2d at 844. In that case, *A.W. Brown* asked the Commission to order the Company to buy electricity from it at a higher, superseded avoided cost rate. *Id.* at 814, 843 P.2d at 843. The Commission found that *A.W. Brown* was not entitled to the higher, superseded rate because *A.W. Brown* had not negotiated or contracted with the Company before the April 29, 1985 cutoff date on which the higher rates were superseded by new ones. *Id.* The Commission also found that *A.W. Brown* had not filed a meritorious complaint against the Company before the cutoff date. *Id.* at 815, 843 P.2d at 844. The Idaho Supreme Court affirmed the Commission's decision and ruled the Commission had the authority to require that, before a rate can be locked in, the developer QF either must have a signed contract or have filed a meritorious complaint alleging the project was mature and that the developer had attempted, and failed, to negotiate a contract with the utility. *A.W. Brown*, 121 Idaho at 845-847, 828 P.2d at 826-818.

In *Rosebud Enterprises, Inc., v. Idaho Public Utilities Commission*, 131 Idaho 1, 951 P.2d 521 (1997), the Idaho Supreme Court affirmed the holding in *A.W. Brown* and found the case followed state and federal law:

> In *A.W. Brown Co.*, this Court ruled that [the Commission] has authority, under state and federal law, to require that before a developer can lock in a certain rate, there must be either a signed contract to sell at that rate or a meritorious complaint alleging that the project is mature and that the developer has attempted and failed to negotiate a contract with the utility; that is, there would be a contract but for the conduct of the utility. Rosebud has neither signed a contract nor established that Idaho Power will not negotiate with it.

Rosebud, 131 Idaho at 6, 951 P.2d at 526.

Last, in *Idaho Power Company v. Idaho Public Utilities Commission*, 155 Idaho 780, 316 P.3d 1278 (2013), the Court considered whether the Commission had properly determined that two wind farms did not have LEOs to sell their power.[5] The Court found:

[5] By way of background, on December 3, 2010, the Commission declined several electric utilities' joint motion to immediately reduce the published avoided cost rate eligibility cap for QFs from 10 average megawatts ("aMW") to

> Considering FERC's declared purpose for adopting the concept of a [LEO] and the broad discretion that [the Commission] has in implementing FERC's rules and in determining the requirements for a [LEO], we again affirm [the Commission's] requirement that a finding of a [LEO] requires a showing that there would have been a contract but for the actions of the utility.

Id. at 787, 316 P.3d at 1285. The Court upheld the Commission's findings of fact that the Company was not at fault for failing to have a written contract before December 14, 2010, the date when the 100-kW eligibility cap took effect. *Id*. The Court further reasoned that because the parties voluntarily negotiated their power purchase agreements, which provided that the effective dates were December 28, 2010, whether there could have been a LEO before entering those agreements was irrelevant under the rule adopted by the Commission. *Id*.

The facts of the case now before this Commission are strikingly similar. The Company and Seller have entered into an agreement that declares an effective date for the contract. Neither party has asserted undue delay in this matter. Order No. 34870 at 7. Therefore, there is no basis or need to determine whether or when a LEO might have attached because the parties entered into a written agreement that defines the operative terms.

The Seller also cites the Commission's and the FERC's settlement stipulation in *FERC v. Idaho PUC*, Case 1:13-cv-00141-EJL-REB, Doc. No. 49-1 (D. Ct. Id., Dec. 24, 2013) for the proposition that the Commission has formally agreed that a LEO may be formed before the execution of a written agreement. The Seller further argues that FERC Order No. 872 supports its position that a QF may be entitled to previously effective avoided cost rates before finalizing an executed written agreement. The Seller's arguments are misplaced. This Commission has always acknowledged and applied FERC's basis for a LEO. As has been well established, a LEO may be formed on the filing of a meritorious complaint with the Commission alleging that the project was mature and that the developer had attempted, and failed, to negotiate a contract due to the actions of the utility. Because there was no undue delay and, in fact, the parties negotiated terms that culminated in an agreement, there was no reason to determine a date upon which a LEO would have attached. Based on the terms of the ESA, the Seller was entitled to a contract with published avoided cost rates that became effective on June 1, 2020.

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100 kilowatts ("kW"). *See* Order No. 32131 at 5. However, the Commission ordered that the reduced eligibility cap of 100 kW would take effect on December 14, 2010. *Id.* at 5-6. The wind farms, larger than 100 kW, lacked signed contracts with the Company and had not filed a meritorious complaint before December 14, 2010. *Idaho Power Company*, 155 Idaho at 787, 316 P.3d at 1285.

Based on the foregoing, we reject Ground I of the Seller's Petition. Federal and State law support the Commission's decision in Order No. 34870 to approve the ESA with new rates from Order No. 34683 that took effect on June 1, 2020.

B. Ground II. Seller's attempts to equate prior "grandfathering" treatment by this Commission is not compelling.

The Seller argued that Order No. 34870 ignores Commission precedent where it allegedly approved a QF's right to rates in effect before the effective date of a written energy sales agreement under similar circumstances. In support of this argument, the Seller cites numerous cases wherein the Commission reviewed contracts between QFs and electric utilities. We find the Seller's arguments unpersuasive.

We applaud the Seller's meticulous efforts to enumerate the various "grandfathering" cases decided by this Commission. However, those cases are clearly distinguishable from the facts of this case. This case does not present a sudden or unanticipated change or departure from Commission precedent such that "grandfathering" should even be considered. Quite the opposite. The change to published avoided cost rates, relevant to this case, occurs each year on June 1. It is a well-documented, established annual adjustment and should have been anticipated by the parties. *See* Order Nos. 32817, 33041, 33305, 33538, 33773, 34062, 34350, and 34683. Nor does this case present a settlement between the parties wherein they agree to a particular rate and demonstrate that the terms of the settlement are a reasonable compromise of the parties' original positions.

Furthermore, the Commission may depart from prior decisions if the Commission's new decision is based on substantial and competent evidence in the record, and sufficient findings. *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1995) (regulatory bodies are not rigorously bound by the doctrine of stare decisis) *citing Intermountain Gas Co., v. Idaho Public Utilities Comm'n,* 97 Idaho 113, 119, 540 P.2d 775, 781 (1975). The decision to employ grandfathering criteria is within the Commission's discretion. Here, substantial and competent evidence demonstrates that the parties intended the effective date to be when the agreement was fully executed by both parties on June 19, 2020 – as plainly stated in the ESA. *Id*. The only published avoided cost rates in effect then were the new rates from Order No. 34683 that took effect on June 1, 2020.

C. <u>Ground III</u>. The Commission's Order is based on sufficient findings which are consistent with Idaho case law.

The Seller asserted the Commission lacked sufficient evidence to determine that the parties intended the ESA's effective date to override the ESA's inclusion of the old rates from Order No. 34350. This is a unique, if not circular, argument. It also ignores that the Commission has long recognized a QF can lock in an existing avoided cost rate under PURPA in Idaho either by: (1) contracting with the utility; or (2) filing a meritorious complaint alleging that a LEO has arisen and, but for the conduct of the utility, there would be a contract. *See A.W. Brown*, 121 Idaho at 816, 828 P.2d at 845. Contracting with the utility necessarily involves an agreement. There must be a just and reasonable basis for determining the appropriate avoided cost rates in the agreement. The agreement itself designates when it becomes effective. This ESA became effective on June 19, 2020. To allow a QF to decide which rates it wants despite language in the ESA to the contrary would be the very definition of arbitrary and capricious, not to mention contrary to the public interest.

D. <u>Ground IV</u>. The Commission's Order is dictated by Idaho case law.

Seller asserted that the Commission should reconsider Order No. 34870 because it is an unreasonable and unjust result for the Seller that invested in the Facility expecting to be paid the old rates from Order No. 34350. *Petition* at 23-24. Further, Seller asserted that the ESA was being negotiated and finalized during the Covid-19 Pandemic where government restrictions on in-person business activities were imposed. *See id.* at 24. Last, Seller claimed to be unrepresented by counsel while negotiating and executing the ESA and unaware the Commission might not allow the expired rates from Order No. 34350 to be used. *Id.*

As stated previously, the Commission updates its published avoided cost rates each year on June 1. The Seller's ignorance of this Commission's practices and procedures does not transmogrify the terms of the ESA as to when the agreement will take effect. Ultimately, the Seller must be responsible for negotiating and completing the ESA in a manner which ensures that it secured the terms, conditions, and rates that it desired. Furthermore, we reject the Seller's argument that the COVID-19 Pandemic impeded its ability to finalize an agreement. Other than the unsupported assertion of an impediment, there is no explanation of how this may have impacted the Seller or hindered negotiations or finalization of the ESA.

ORDER

IT IS HEREBY ORDERED that, based on the reasoning and explanation as outlined in the body of this Order, the Seller's Petition for Reconsideration is denied.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. *See Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 5th day of April 2021.

PAUL KJELLANDER, PRESIDENT

KRISTINE RAPER, COMMISSIONER

ERIC ANDERSON, COMMISSIONER

ATTEST:

Jan Noriyuki
Commission Secretary

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